



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Kerrie Romanow
Kim Walesh

**SUBJECT: CISCO DONATION OF
HABITAT MITIGATION LAND**

DATE: May 30, 2014

Approved

Date

6/6/14

COUNCIL DISTRICT: 4

RECOMMENDATION

It is recommended that the Council take the following actions:

1. Approve an Agreement with Cisco Systems, Inc. for a donation and transfer of 21.4 acres of land in the Alviso area to the City of San Jose.
2. Direct the Environmental Services Department to conduct due diligence on the 21.4 acre parcel, including environmental site assessments as appropriate.
3. Direct the Director of the Environmental Services Department to seek external funding in order to maintain the transferred land as burrowing owl habitat adjacent to the owl habitat identified within the Plant Master Plan.
4. Direct the City Manager to negotiate and execute an Assignment and Assumption Agreement during the due diligence period to assume Cisco's obligations on the property, if appropriate.
5. Subject to the due diligence findings and to satisfying the conditions precedent in the donation agreement, direct Real Estate to accept and record the deed associated with the property.

OUTCOME

The proposed addition of the 21.4 acres will remain as open space and wetlands and will contribute to the successful management of burrowing owl habitat in the area.

BACKGROUND

On June 6, 2000, the City Council approved a Planned Development Rezoning (file no. PDCSH 99-06-054) of the property located on both sides of North First Street, between State Route 237 and Grand Boulevard on roughly 153 acres, for office, research and development, light manufacturing, and related uses. The conditions of approval required Cisco to set aside and maintain 21.4 acres as mitigation for the loss of burrowing owl habitat, including establishment of 0.77 acres of wetlands within the owl habitat to mitigate for loss of wetlands, and to transfer the habitat land to a public agency or non-profit within five years. Cisco complied with the mitigation requirements with respect to maintaining a 21.4 acre portion of the property as Burrowing Owl habitat and creating 0.77 acres of wetlands on the property. But Cisco did not comply with the obligations to transfer the property to a public entity or non-profit. The transfer contemplated in the Agreement for Transfer of Property to the City of San Jose from Cisco Technology, Inc., fulfills that obligation.

Beginning in 2007, the City began developing a master plan for the San José-Santa Clara Regional Wastewater Facility (RWF). The Plant Master Plan ("PMP") was approved by the City on November 19, 2013 and included 1,170 acres of habitat land. Of the 1,170 acres allocated for habitat, 180 acres were allocated for Burrowing Owl habitat. Under the stewardship of the Environmental Services Department ("ESD"), the burrowing owl population has been increasing over the last two years. In 2011, no more than four owls had been observed during surveys, in 2014, up to sixteen owls were observed during breeding season surveys. Prior to habitat management actions on RWF bufferlands, most owls observed were located on the Cisco property. Following implementation of management actions, owls have been observed utilizing both sites. The proposed donation and transfer of Cisco's 21.4 acres will allow for the coordinated management of the Burrowing Owl habitat, with the RWF paying for management of the existing habitat on the buffer lands and the City paying for the management of the habitat on the Cisco parcel.

ANALYSIS

Strategic management of Burrowing Owl habitat can result in larger numbers of Burrowing Owls. ESD has had success in increasing the area Burrowing Owl population on the RWF bufferlands through thoughtful management practices. Aggregating the Cisco property with the RWF Burrowing Owl habitat potentially provides the opportunity for the comprehensive management of both properties to the benefit of the owl population in the area, once City funding for maintenance activities has been identified for the Cisco property.

Responsibility for the ongoing management of the wetlands on the site will also transfer to the City with the land donation, but according to staff from the Regional Water Quality Control Board (Water Board), Cisco was only required to maintain the wetlands for five years until they were established and could maintain themselves. The wetlands met the Water Board's established success criteria in 2005, and further maintenance of the wetlands by the City is not required. Maintaining the site as open space/Burrowing Owl habitat does not pose a threat to their existence or continued function.

Terms of Agreement

The Agreement for Transfer of Property to the City of San Jose from Cisco Technology, Inc. provides:

1. That the property be used for and maintained as habitat for the burrowing owl.
2. For a diligence period during which the City can evaluate the environmental condition of the property.
3. The requirement that the City negotiate and execute an Assignment and Assumption Agreement during the Due Diligence period obligating the City to Assume all the rights and obligations in the Agreements between Cisco and Trammel Crow and South Bay Development as those rights and obligations relate to the donation property.
4. For Cisco to pay the City \$1.00 as consideration for the transfer.
5. For Cisco to pay for title insurance and the escrow and closing costs.
6. For certain limitations on the City's ability to transfer the property or assign its rights in the property without Cisco's consent.
7. That the City will assume all post-closing obligations and liabilities associated with the property including maintenance and compliance with all permit and mitigation obligations. Cisco estimates that their annual cost to maintain the habitat is roughly \$9,800.
8. That the City release Cisco for any known or unknown liabilities associated with hazardous substances on the property. The parties assume that the property does not contain hazardous substances above action levels and the City will have the opportunity to conduct due diligence including environmental sampling prior to closing. If the City finds anything concerning in its environmental site assessments, the City will have the right to refuse the property. By releasing Cisco, the City may have limited recourse to prior owners of the property if hazardous substances are discovered at a later date, because of Cisco's agreements with the prior owners.
9. For Cisco to set aside a \$40,000 contingency to be available to the City for five years following the date of transfer in the event the Army Corps of Engineers or the Regional Water Quality Control Board require the city to maintain or re-create the wetlands on the property.

EVALUATION AND FOLLOW-UP

If Council approves acceptance of the 21.4 acres of Burrowing Owl habitat, ESD will seek non-enterprise funding sources in order to include the maintenance of the land with ESD's regular maintenance activities on the RWF's adjacent property. Once it becomes managed as owl habitat, the RWF's Burrowing Owl habitat management program could begin providing expanded reports that include the added property on a regular basis. The next Transportation and Environment Committee burrowing owl update is scheduled for June 2, 2014.

PUBLIC OUTREACH/INTEREST

- ☐ **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
(Required: Website Posting)
- ☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

While this action does not meet any of the above criteria, this memorandum will be posted on the City's website for the June 17, 2014 meeting City Council meeting.

COORDINATION

The memorandum has been coordinated with the City Attorney's Office and with the City Manager's Budget Office.

FISCAL/POLICY ALIGNMENT

The proposed donation of land is consistent with the City's and RWF's commitment to progressive stewardship of habitat and scarce resources. The Agreement with Cisco includes provisions that limit potential liability associated with acceptance of the 21.4 acres.

CEQA

Cisco Site 6 EIR (File No. PDC99-054), Resolution Number 69636, adopted June 6, 2000.

/s/ Ashwini Kantak for
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/s/
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Chief Strategist

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